Supreme Court, U.S.
FILED
APR 2 1980
MICHAEL RODAK, JR., CLERK

No. 79-1042

In the Supreme Court of the United States

OCTOBER TERM, 1979

ROGER DOLESE, ET AL., *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITIONERS' REPLY MEMORANDUM

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PETITIONERS' REPLY MEMORANDUM

The memorandum in opposition filed by the United States is designed to suggest to this Court that this is merely a "substantial evidence" case. To the contrary, petitioners have been denied a trial by a District Judge widely noted for his aversion to trying cases and known for his other erratic conduct. Petitioners made a detailed offer of proof on the basis of which a trier of fact could have found in their favor. The District Judge rejected the offer and entered summary judgment when there admittedly were significant questions of fact to be tried. The primary relief sought here is a reversal and remand with instructions to grant petitioners a trial on the merits.

The United States misrepresents the unique factual background of this case. Of the antecedent action of *Dolese* v. *Dolese, et al.*, the State trial judge testified:

> "In my judicial career I have tried over 10,000 divorce cases and the case of Dolese v. Dolese, et al., is *the only such case involving corporate defendants as more than nominal defendants.*"
>
> Affidavit of Judge Geo. Howard Wilson, ¶ 11; Pet. App. p. 51a.

Judge Wilson determined based on the evidence submitted in that case that the lawsuit itself was "not just a divorce action but that it included a conspiracy to take over control of the three Dolese companies," and that these companies "were not involved in the personal aspects of the Dolese case but *only in the protection of their corporate lives.*" [1] *Id.* ¶¶ 9, 11. Pet. App. pp. 49a, 51a.

Attempting to characterize this proceeding as a simple divorce, the United States glosses over this singular corporate involvement:

> "Certain aspects of the divorce action focused upon Roger's activities vis-a-vis the corporate petitioners and, pursuant to Oklahoma law,[2] the corporate petitioners were named parties to the divorce action." Mem. p. 2.

Petitioners concede that if a mere divorce were at issue and if these corporations had voluntarily paid the litigation expenses of Roger Dolese, cases such as *Hartwell* v. *Commissioner*, 24 TCM 278 (1965) would be on point.[3] Petitioners also concede that Roger Dolese's share (as determined by the State Court) of the litigation expense is personal in origin and non-deductible.[4] However, as to the corporate petitioners, the action of *Dolese* v. *Dolese, et al.*, was a receivership and attempted takeover; thus, their expenses had a business origin and are properly deductible under *United States* v. *Gilmore*, 372 U.S. 39 (1963).

The Tenth Circuit has held that some portion of the corporate legal expense has a business origin, is deductible and not a dividend. The corporations have deducted that portion charged to them by the State Court judge, and have offered the affidavit of that

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[1] As fully set forth in the Petition, from December 3, 1959, only two months after the action of *Dolese* v. *Dolese* was begun on September 29, 1959, until its final resolution on December 19, 1968, the Dolese companies were subject to a restraining order tantamount to a receivership (whereunder court approval was necessary to make or liquidate investments, purchase or sell assets, settle disputes, etc.) and were later threatened with a complete takeover of corporate management.

[2] The Oklahoma law in question is a standard provision permitting joinder of any person "who has or claims interest in the controversy adverse to the plaintiff or who is a necessary party to a complete determination. . . ." Okla. Stat. tit. 12, § 231; Pet. App. p. 4a. Joinder of the corporations was not a pro forma procedural requirement of that State.

[3] In none of the cases cited by the United States, *Hartwell, supra; Weil* v. *Commissioner*, 26 TCM 388 (1967); *Greenspon* v. *Commissioner*, 229 F.2d 947 (8th Cir. 1956), was the corporation a party to litigation, defending its business conduct and legally charged with the costs thereof.

[4] In the opinion of an impartial State Court judge this one-fourth share constituted the entire portion of the legal expenses attributable to Roger's personal divorce litigation. (Mem. p. 6.)

judge in support of his determination. Pet. App. p. 45a ff. How can an alternative allocation of this expense be made without opposing evidence and without trial; how can there be an entry of summary judgment which is proper only where there are no material factual issues unresolved?

On the issue of the corporate advances to Roger Dolese, the United States again misrepresents the significant facts. The state court restraining order, entered December 3, 1959 and in force until December 19, 1968, prevented *inter alia* any dividend payments from the Dolese companies. Nevertheless, from 1959 to 1967 the state court instructed these companies to advance to Roger Dolese amounts totaling $1,184,461.82 to enable him to pay litigation expenses which it had assessed against him, a large portion of which were later reassessed against the corporations directly. Pet. p. 7. These were not monies voluntarily withdrawn by Roger Dolese for personal use; indeed he was legally denied any such use of corporate funds. Moreover, insofar as he was able, Roger Dolese made consistent payments on this account.[5]

The United States contends that petitioners submitted no evidence that would permit the "inference of either an intent to repay or an expectation of repayment." Mem. p. 5. However, promptly upon release

[5] The United States' characterization of these repayments as *de minimis* (Mem. p. 4) is clearly erroneous. A schedule of repayments contained in petitioners' offer of proof (Rec. App V, p. 299) is reproduced as an Appendix hereto. Further, the $599,900 which the United States suggests was simultaneously credited and readvanced to Roger, (Mem. p. 4, fn. 3) was a bookkeeping transfer of the account from Dolese Concrete Co. to its parent, The Dolese Company, made *at the suggestion of the IRS examining agent.*

of the court order restraining him from taking possession of corporate assets, Roger Dolese liquidated Dolese Bros. Co. at a tax cost of approximately $1,750,000, *solely* to avail himself of sufficient liquid assets to settle this account. Pet. p. 28. In none of the proceedings below was any purpose for this transaction other than to obtain repayment funds even suggested. Petitioners' uncontested affidavits unanimously affirm this single intent. Rec. App. V, pp. 244, 282, 295. There is *no other* permissible inference.

The United States cites *Hahn* v. *Sargent,* 523 F.2d 461 (1st Cir. 1975), *cert. denied,* 425 U.S. 904 (1976) for the proposition that the allegation of a material subjective intent is not alone sufficient to defeat a summary judgment motion. Mem. p. 6. In *Hahn,* the plaintiff's affidavits "rather than setting forth appellant's personal knowledge, of 'such facts as would be admissible in evidence' and showing appellant's competence to testify to the facts asserted, presented a compendious replica of the complaint. . ." *Id.* at 466-7. In other words there was a failure of proof. However, *Hahn* supports petitioners' contention that affidavits properly based on personal knowledge may be submitted as sufficient evidence of subjective intent. Petitioners' affidavits are such evidence, and, combined with the fact of the Dolese Bros. liquidation, the consistent tax and book treatment of the advances, the payment of state intangibles and franchise tax on these amounts, present at the very least a material issue for trial.

The United States attempts to distinguish *United States* v. *Smith,* 418 F.2d 589 (5th Cir. 1969) and *Ruben* v. *Commissioner,* 97 F.2d 926 (8th Cir. 1938)

by alleging that the claims therein "were prompted by corporate business purpose." Mem. p. 7. In both these cases the claims arose with respect to property, only later transferred to the corporations, held by the shareholders either individually or in partnership. The claims were filed against the shareholders individually and against the corporations as transferees. Both Circuit Courts held that so long as the corporations satisfied a legally binding corporate obligation, however beneficial to the shareholders, there was no constructive dividend as a matter of law. The discussion in *Smith* which deals with the standard of shareholder benefit *assumes as a condition precedent* the absence of corporate liability—a fact clearly contrary to this case.

In oversimplifying its description of this case, the United States has attempted to pass it off as the standard *Gilmore-Hartwell* situation. Petitioners have made a complex and elaborate offer of proof, to establish the overwhelming factual distinctions between those cases and this. They were denied any opportunity to present this evidence below (Pet. p. 9), and now the government seeks to dismiss their case by blandly characterizing it as precisely what petitioners' have begged to show it is not. This Court should intervene to prevent such an ironic injustice.

Respectfully submitted,

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April 1980

APPENDIX

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Rec. App. V. p. 238

Schedule of Repayments Made by Roger Dolese and Credits Applied in Reduction of Roger Dolese Account Receivable and Note Receivable Account as Reflected on the Books of the Dolese Company and Dolese Concrete Company for the Period April 1, 1949 Through December 31, 1974

Period Ended	
4-1-49 to 3-31-52	$ 87,982.08
3-31-53	—0—
3-31-54	154,484.47
3-31-55	—0—
3-31-56	518,432.84
3-31-57	24,266.09
12-31-57	87,686.44
12-31-58	51,999.58
12-31-59	270,085.20
12-31-60	16,462.00
12-31-61	107,336.45
12-31-62	50,378.00
12-31-63	61,360.00
12-31-64	661.69
12-31-65	225,706.92
12-31-66	300.00
12-31-67	1,314.74
12-31-68	34,247.89
12-31-69	478,549.44
12-31-70	10,534.67
12-31-71	20,935.29
12-31-72	195.00
12-31-73	14,428.38
12-31-74	6,400.00
	$2,223,747.17